Chuah Teong Hooi & Anor v Employees Provident Fund Board

HIGH COURT (PENANG) — ORIGINATING SUMMONS NOS 31-257-87 AND 31-259-87
WAN ADNAN J
16 APRIL 1990

Companies and Corporations — Priority of claims — Receivers and managers appointed by debenture holders — Claim by receivers and managers for their costs, charges and expenses — Statutory contributions by employer and employees to Employment Provident Fund — Claim by board of Fund for contributions — Whether claim by board had priority over claim by receivers and managers — Companies Act 1965, ss 191 & 292 — Employees Provident Fund Act 1951, ss 7 & 8

Provident Fund — Priority of claim by Employment Provident Fund Board — Receivers and managers appointed by debenture holders — Claim by receivers and managers for their costs, charges and expenses — Statutory contributions by employer and employees to Employment Provident Fund — Claim by board of Fund for contributions — Whether claim by board had priority over claim by receivers and managers — Companies Act 1965, ss 191 & 292 — Employees Provident Fund Act 1951, ss 7 & 8

The plaintiffs were the receivers and managers of two companies appointed pursuant to certain debentures granted by the companies. The defendant board administered the employees provident fund pursuant to the Employees Provident Fund Board Act 1951 ('the EPF Act'). The total costs, charges and expenses incurred by the plaintiffs in the exercise of their powers pursuant to the debentures exceeded the amount realized on the sale of the assets of the companies. The plaintiffs applied to the court pursuant to s 183(3) of the Companies Act 1965 for directions as regards the priority of the claim by the plaintiffs for the costs, charges and expenses incurred by them and the claims by the defendant for payment of the employer's and employees' contributions due under s 7(1) of the EPF Act. It was contended for the plaintiffs that the defendant's claim ranked after the plaintiffs' claim for payment of the costs, charges and expenses of the receivership but in priority to the claim of the debenture holders for the amount due to them.

Held, deciding the application in favour of the defendant:

(1) Under the Companies Act 1965 the defendant's claims did take priority over the claims of the debenture holders under a floating charge but they did not gain priority over the claims of the receivers and managers for receivership costs and expenses.

(2) Under s 7(1) of the EPF Act every employee and every employer of a person shall be liable to pay monthly contributions and in s 8(1) of the same Act it is provided that the employer shall, in the first instance, be liable to pay both the contributions payable by himself and also the contributions payable by the employee. The EPF Act makes it obligatory upon the employer to pay first the monthly contributions payable by himself and by the employee. So far as the defendant was concerned, it was the employer who must pay both the contributions. Whether or not he wanted to or was able or unable to recover from the employee the contributions which he paid on behalf of the employee was no concern of the defendant.

(3) The plaintiffs' contention that no deductions were made for EPF contributions under s 10 of the EPF Act is not tenable. Since deductions were made from the gross wages of the companies' employees during the period relevant to the defendant's claims, it could be assumed that the deductions also included deductions for the EPF contributions. Under s 15 of the EPF Act, these sums were not liable to be attached in respect of any claim whatsoever including the claims by the plaintiffs as receivers and managers. Notwithstanding the provisions of the Companies Act 1965 the defendant's claims took priority over the claims by the plaintiffs for their costs and expenses.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-499-89 and No 02-500-89.]

Case referred to

1 *Re Glyncorrwg and General Trust Co Ltd* [1926] Ch 951 (refd)

Legislation referred to

Companies Act 1965 ss 191, 292
Employees Provident Act 1951 ss 7, 8

Foo Say Keow (*Ahmad Murad bin Abdul Aziz* with him) for the plaintiffs.

NG Sivanandan (*Karin Lim Ai Chin* (*Ms*) with him) for the defendants.

Cur Adv Vult

Wan Adnan J: This is an application under s 183(3) of the Companies Act 1965 which states as follows:

> A receiver or manager of the property of a company may apply to the Court for directions in relation to any matter arising in connection with the performance of his functions.

The plaintiffs are the receivers and managers of Atlas Intek (Malaysia) Sdn Bhd ('the company') appointed pursuant to the provisions of the debentures dated 13 August 1984 and 13 August 1985 ('the debentures'). The appointments were effective from 1 November 1985. The company is insolvent and unable to meet all its outstanding liabilities. At the time of the appointment of the plaintiffs as managers and receivers the liabilities of the company totalled $133,908,000. Included in the liabilities are the following:

(i) the employer's monthly contributions provided in s 7(1) of the Employees Provident Fund Act 1951 for the months of June to October 1985 in respect of employees of the company totalling $163,489;

(ii) the employees' monthly contributions provided in s 7(1) of the Employees Provident Fund Act 1951 for the same period in respect of the employees of the company totalling $135,968.

The total costs, charges and expenses incurred by the plaintiffs for the period from 1 November 1985 to 30 April 1989 in connection with the exercise of their powers under and/or pursuant to the debentures amounted to $6,454,000. As at 30 April 1989, the proceeds of sale or realization of the assets of the company subject to the floating charges amounted to only $4,713,000.

In view of the fact that the total proceeds of sale or realization of the assets of the company are less than the

total costs and expenses incurred by the plaintiffs, a direction of the court is applied for as to the priority for payment between the claims of the Employees Provident Fund Board and the plaintiffs' claims.

Clause 8 of the debenture dated 10 August 1984 provides as follows:

> 8.1 Subject to any claims ranking in priority to and/or pari passu with those of the facilities under this debenture, all moneys realized upon a sale or collected or received by the agent and/or the receiver and/or manager in the exercise of his power, authorities and discretions shall be applied by the agent or, as the case may be, the receiver and/or manager as follows:
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> 8.1.1 In relation to proceeds from the sale of the fixed assets covered by the fixed charge:
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> firstly, in payment of all costs charges and expenses and liabilities incurred by the agent or, as the case may be, the receiver and/or the manager in connection with the exercise of its or his powers under and pursuant to the loan agreement and this debenture;
> secondly, in or towards payment to the A co-lenders pari passu and rateably of all interest accrued and remaining unpaid on the principal moneys due by the company to A co-lender pursuant to the loan agreement and this debenture;
> thirdly, in or towards payment to the A co-lenders pari passu and rateably of the principal moneys due by the company to the A co-lenders pursuant to this debenture;
> fourthly, in or towards payment to the B co-lenders pari passu and rateably of all interest commission and fees accured (sic) and remaining unpaid on the principal moneys due by the company to the B co-lender pursuant to the loan agreement and this debenture;
> fifthly, in or towards payment to the B co-lenders pari passu and rateably of the principal moneys due by the company to the B co-lenders pursuant to this debenture;
> sixthly, the surplus, if any, shall be paid to the company or other person or persons legally entitled to the same.
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> 8.1.2 In relation to proceeds from the sale of the non-fixed assets covered by the floating charge:
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> firstly, in payment of all costs charges and expenses and liabilities incurred by the agent or, as the case may be, the receiver and/or the manager in connection with the exercise of its or his powers under and pursuant to the loan agreement and this debenture;
> secondly, in or towards payment to the B co-lenders pari passu and rateably of all interest commission and fees accrued and remaining unpaid on the principal moneys due by the company to B co-lender pursuant to the loan agreement and this debenture;
> thirdly, in or towards payment to the B co-lenders pari passu and rateably of the principal moneys due by the company to the B co-lenders pursuant to this debenture;
> fourthly, in or towards payment to the A co-lenders pari passu and rateably of all interest accured (sic) and remaining unpaid on the principal moneys due by the company to the A co-lender pursuant to the loan agreement and this debenture;
> fifthly, in or towards payment to the A co-lenders pari passu and rateably of the principal moneys due by the company to the A co-lenders pursuant to this debenture;
> sixthly, the surplus, if any, shall be paid to the company or other person or persons legally entitled to the same.

There are similar provisions in the debenture dated 13 August 1985.

Section 191(1) of the Companies Act 1965 states as follows:

> Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages salary vacation leave or superannuation or provision fund payments and any amount which in a winding up is payable in pursuance of section 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

According to Mr Foo, counsel for the plaintiffs, the priority for payments in accordance with the provisions of the debentures was as follows: firstly, payment for costs charges and expenses for receivership; secondly, payment to debenture holders; thirdly,payment to the EPF Board.

He however conceded that the priority was changed by ss 191 and 292 of the Companies Act 1965 but contended that the change was not to the extent that the EPF claims gained priority over the claims of the receivers and managers. The EPF claim which is a preferential debt only took priority over the debenture holders' claims. Section 292(4) provides as follows:

> So far as the assets of the company available for payment of general credits are insufficient to meet any preferential debts specified in subsection 1(b), (d) and (e) and any amount payable in priority by virtue of subsection (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

I was referred to the case of *Re Glyncorrwg and General Trust Co Ltd*[1] where the priority was fixed as follows: first, cost of realization; secondly, the costs including remuneration of the receiver; thirdly, the costs, charges and expenses of the debenture trust deed including the trustees' remuneration; fourthly, the plaintiffs' cause of action; fifthly, preferential creditors; and sixthly, the debenture holders.

I do agree that under the Companies Act 1965 the EPF claims do take priority over the claims of the debenture holders under a floating charge but they do not gain priority over the claims of the receivers and managers for receivership costs and expenses.

I now proceed to consider the provisions of the Employees Provident Fund Act 1951 ('the EPF Act').

Under s 7(1) of the EPF Act every employee and every employer of a person shall be liable to pay monthly contributions at the rate set out in the Third Schedule to the EPF Act and in s 8(1) it is provided that the employer shall, in the first instance, be liable to pay both the contributions payable by himself and also the contributions by the employee. Under s 10, the employer can recover from the employee the amount of the employee's contribution by means of deduction from the wages due to the employee. Section 11 makes the employer liable to pay interest if the contributions payable are not paid within the prescribed period. Under s 16A(c) it is an offence if an employer fails within the prescribed period to pay the monthly contributions. Whenever any property of an employer is sold under s 17A of the EPF Act the proceeds of the sale may be distributed only after provision has been made for the payment of contributions payable by the employer.

The EPF Act makes it obligatory upon the employer to pay first the monthly contributions payable by himself and by the employee. It is an offence if he fails to do so. So far as the EPF is concerned it is the employer who must pay both the contributions. Whether or not he wants to or is able or unable to recover from the employee the contributions which he pays on behalf of the employee is no concern of the EPF. The liability to pay is on the employer.

Section 15 of the EPF Act provides as follows:

> Notwithstanding anything to the contrary contained in any other written law:
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> (a) no sum deducted from the wages of a member of the Fund under section 10;
> (b) no amount payable by the employer as his contribution; and
> (c) no amount standing to the credit of a member of the Fund,
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> shall be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever, nor shall the Official Assignee be entitled to or have any claim on any such sum or amount:

Raja Arshad bin Raja Tun Uda, one of the plaintiffs, in his affidavit sworn on 10 November 1989 says in para 5 as follows:

> I verily say in the months of July until October 1985 the company paid its employees only their nett wages. However nowhere in the company's records and accounts can it be seen that actual moneys (representing the alleged deductions for the purpose of contributions to EPF) actually were appropriated from the gross wages and put aside in the company's funds and/or assets. At all material times, there were and are no real moneys in the company's funds representing any actual deduction from the employees' wages for the purpose of EPF contributions.

I think what the receiver is saying is that although the employees were paid only their nett wages (meaning, deductions had been made from their gross wages) no deductions were made for EPF contributions under s 10. I cannot accept this conclusion. Since deductions were made during the period in question from the employees' gross wages, it can be assumed that the deductions also included deductions for the EPF contributions. The EPF is not making any claim in respect of any earlier period. Therefore there must have been deductions for EPF contributions for the earlier period. The sums deducted come under the sum in s 15(a). Section 15(b) refers to the amount which the company still owes the EPF as their contributions. These sums are not liable to be attached in respect of any claim whatsoever including the claims by the plaintiffs as receivers and managers.

The amount now in the hands of the plaintiffs as receivers and managers as at 30 April 1989 is $4,713,000. They say these are the proceeds of sale or realization of assets of the company subject to the floating charge. Since deductions for EPF contributions were made when the employees were paid their nett wages, a sum from the said sum equivalent to the total amount of the deductions must be regarded as the sum under s 15(a). That sum is $135,968. The amount payable by the company under s 15(b) is $163,489. Whenever there is a sum due from any employer as his contributions to the EPF, from any moneys in the hands of the company or its receivers and managers, the amount due to the EPF must be paid first. Under s 15 these sums must first be paid to the EPF Board.

It is therefore my view that notwithstanding the provisions of the Companies Act 1965, the EPF claims take priority over the claims of the plaintiffs for their cost and expenses. I therefore give direction that from the sum of $4,713,000 the claims of the EPF Board amounting to $299,457 shall be paid forthwith together with the rate of dividend and interests under ss 8(3) and 11(1) of the EPF Act.

I give a similar direction on the application under Originating Summons No 529/87. The claims of the EPF Board of $280,954 must be paid forthwith together with the rate of dividend and interest under ss 8(3) and 11(1) of the EPF Act. Costs are to be paid by the plaintiffs as receivers and managers.

Order accordingly.

Solicitors: *Murad & Foo; Presgrave & Matthews.*

Reported by *PS Ranjan*